UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Mar. 22, 1995
UNITED STATES OF AMERICA

Plaintiff,

Criminal No. 89-218

v.

O P I N I O N

RICHARD O. BERTOLI

Defendant.

Appearances: John M. Fietkiewicz, Esq.
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Counsel:

This matter is presently before the court for resentencing pursuant to the directions of the Third Circuit.

PROCEDURAL BACKGROUND[1]

On 24 August 1993, a jury found Richard O. Bertoli ("Bertoli") guilty of conspiracy to obstruct justice, in violation of 18 U.S.C. § 371, and obstruction of justice, in violation of 18 U.S.C. §§ 1503 and 2. After months of extensive briefing on

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1 This opinion is meant to be read together with *United States v. Bertoli*, 854 F.Supp. 975, 1125-1137 (D.N.J. 1994), wherein the facts underlying this case have been set forth in detail. The facts will not be repeated herein unless relevant to a specific point.

In connection with sentencing, an Addendum to the Presentence Report previously submitted was received from the United States Probation Office.

The Government submitted: Government's Memorandum Concerning the Resentencing of Richard O. Bertoli, dated 13 January 1995 (the "Government's Resentencing Memorandum"); Letter, dated 27 January 1995 (the "27 January 95 Resentencing Letter"); Resentencing Affidavit of Michael J. Cahill, Special Agent of the Federal Bureau of Investigation (the "Cahill Resentencing Affidavit.") Also submitted at the court's request: Government Brief and Supplemental Appendix in response to Bertoli's application of conviction and sentence (the "Government's Circuit Brief") and the Petition of the United States for Panel Rehearing.

Bertoli submitted: Letter, dated 12 January 1995 ("Bertoli 12 January 1995 Resentencing Letter"); Letter, dated 26 January 1995 ("Bertoli 26 January 1995 Resentencing Letter"). Also submitted at the court's request: Brief of Appellant ("Bertoli Appellate Brief"); Reply Brief of Appellant and Supplemental Appendix ("Bertoli Appellate Reply Brief"); Petition of Appellant for Rehearing and Suggestion for Rehearing in Banc ("Bertoli Rehearing Petition"). Also considered were all submissions listed in *U.S. v. Bertoli*, 854 F.Supp. 955, 1125, n.232 (D.N.J. 1994).

various post-trial motions and Sentencing Guidelines issues, Bertoli was sentenced on 28 March 1994. At that time, it was determined that Bertoli's counts of conviction should be segregated to three groups for the purpose of calculating the guideline range. It was also determined Bertoli's obstruction of the instant matter occurred while he was on pretrial release. It was further determined Bertoli was an organizer or leader of the obstructionist activities. In addition, it was determined Bertoli's criminal history category is II. Accordingly, pursuant to the 1993 Sentencing Guidelines Manual, Bertoli's Sentencing Guideline range was 87 to 108 months, a range that resulted from an offense level of 28 and a criminal history category of II. Bertoli was sentenced to a term of imprisonment of 100 months and a fine of $7 million. *See United States v. Bertoli*, 854 F.Supp. 975, 1125-55 (D.N.J. 1994).

On 28 October 1994, the Circuit affirmed Bertoli's conviction. *United States v. Bertoli*, 40 F.3d 1384, 1389 to 1400, 1414 (3d Cir. 1994). The Circuit observed that "the obstruction of justice activities that are the subject of Count Six of the Indictment occurred in 1990, and ... the conspiracy charged in Count Three occurred between 1983 and 1992...." *Id.* at 1401. The Circuit, however, ordered that Bertoli be resentenced because it concluded that the 1989 Sentencing Guidelines Manual should be applied to both of Bertoli's counts of conviction and that, under the 1989 Manual, the cross-reference provisions of section 2J1.2 cannot be applied to one, like Bertoli, whose obstructive conduct was designed to protect

himself, as well as others. *Bertoli*, 40 F.3d at 1401 to 1407, 1414.

The Circuit also ordered a recalculation of the fine imposed because it concluded that the factual findings made to support the upward departure from the Sentencing Guidelines fine range were not supported by clear and convincing evidence -- a standard of proof that the Circuit concluded was necessary to support certain upward departures for fines. *Bertoli*, 40 F.3d at 1407 to 1414. On 2 December 1994, the Circuit denied both the Government's and Bertoli's motions for rehearing. On 12 December 1994, the Circuit issued a mandate, remanding this case for resentencing consistent with the Circuit's opinion of 28 October 1994.[2]

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[2] Bertoli waited until 14 February 1995 to make an application for bail pending resentencing. The Government submitted opposition to this motion on 24 February 1995; Bertoli replied on 1 March 1995. The bail hearing was held on 6 March 1995. At the bail hearing, at Bertoli's request, resentencing was scheduled. It was scheduled for one week later, 13 March 1995, in order to ensure Bertoli's presence.

Bertoli has offered no explanation as to why the bail application was delayed some four months after the Circuit ordered his resentencing. Nevertheless, because resentencing was scheduled to, and did in fact, take place within one week of the bail hearing, the bail application was rendered moot -- as recognized by Bertoli's counsel at the resentencing hearing. Resentencing tr. at 66.

ISSUES ON APPEAL

The Bertoli appellate briefs submitted to the Circuit in this matter concern four main issues, only one of which involves sentencing. Those issues are found in Point III of Bertoli's Appellate Brief. The outline of the argument, as set forth in Bertoli's Appellate Brief at Point III, is as follows:

THE SENTENCE OF 100 MONTHS INCARCERATION AND A $7,000,000 FINE WERE (sic) IMPOSED IN VIOLATION OF THE SENTENCING GUIDELINES AND OTHER APPLICABLE LAW.

A. The Cross-Referencing Provision of Guideline § 2J1.2(c)(1) Should Not Have Been Applied Because Mr. Bertoli Was Alleged To Have Obstructed Justice To Protect Himself Rather Than Another.

B. Even if the Cross-Referencing Provision Applied, the Amount of the Loss Is Zero; the District Court's Adjustment Based on the Supposed Amount of the Loss Was Therefore Improper.

C. The $7,000,000 Fine Imposed on Mr. Bertoli Was Excessive and Otherwise Contrary to Law.

Bertoli Appellate Brief at i and ii. (Capitalization as in original.) The Bertoli Appellate Reply Brief raises but one point concerning sentencing, as set forth at Point V:

> Mr. Bertoli's sentence of 100 months incarceration and a $7,000,000 fine was excessive and vindictive.

Bertoli Appellate Reply Brief at i. The Bertoli Petition for Rehearing does not raise any issue concerning sentencing.

These issues, as set out in Bertoli's appellate submissions, were the only sentencing issues presented to the Circuit.[3] Bertoli now wishes to raise matters which, although presented to this court prior to and at sentencing, and ruled on by this court at sentencing, were *not* the subject of his appeal.

In the 12 January 1995 Resentencing Letter, Bertoli states:

> We object to each of the enhancements above the base offense level of 12 and to the placement of Mr. Bertoli in Criminal History Category II. In so doing, *we reassert our previously-made objections* and urge, additionally, the following:
>
> Guidelines § 2J1.2(b)(2)
> (substantial interference).

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[3] As explained by the Circuit, the issues raised by Bertoli concerning his sentencing are as follows:

> Bertoli first contends that the district court's application of the cross reference in the 1993 Guideline for obstruction of justice violated his right to be free from *ex post facto* punishments, guaranteed by Article I, § 9 of the United States Constitution.

Id. at 1402.

Bertoli next contends that the district court erred in departing upward from the [G]uideline maximum fine of $125,000 to a fine of $7 Million. *Id.* at 1407.

Guidelines § 3D1.4
(grouping of three groups)

Guidelines § 3B1.1
(role in the offense).

Guidelines § 2J1.7
(Committing Offense While on Release)

Criminal History Category
Guidelines § 4A1.1(d)

The Fine

Bertoli 12 January 1995 Resentencing Letter at 2, 3, 8 and 9. (Emphasis added; text omitted.)

The Government contends that a review by this court of such arguments and objections is inappropriate. As argued by the Government:

> "Despite the fact that Bertoli strongly objected to these rulings and took every opportunity to make his appellate record prior to sentencing on March 28, 1994, Bertoli did not challenge these rulings on appeal. Moreover, the Third Circuit did not question these rulings in any way."

27 January 95 Resentencing Letter at 2.

Bertoli's arguments that these issues, which were not presented to the Circuit in his appeal, should be considered at

resentencing are rejected. The Circuit thoroughly reviewed the guideline computation used when sentencing was imposed on 28 March 1994. *See Bertoli*, 40 F.3d at 1402-1407. In fact, it appears all aspects of the guideline computation were considered by the Circuit. Thereafter, the Circuit held:

> Because by using the 1993 Guidelines Manual, the trial court imposed a sentence in excess of what would have been permissible under the 1989 Manual, the sentence imposed violated Bertoli's right against *ex post facto* punishment. The sentence therefore must be vacated and the matter remanded for re-sentencing under the 1989 Manual.

Id. at 1407. Because the Circuit determined the application of the cross-reference in § 2J1.2(c)(1) was incorrect and should not have been applied, it found there was no need to address Bertoli's argument that the calculation of loss under the cross-referenced Guideline was erroneous. *Id.* at 1407 n.22.[4]

Accordingly, through the use of the 1989 Manual, Counts Three and Six result in three separate guideline calculations and are then subject to the grouping rules at § 3D1.4 to determine the final offense level. The computation is as follows:

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[4] This issue is found at Point III B of the Bertoli Appellate Brief, Point III B at ii.

Group One -- Obstruction of Federal Court proceedings

Base Offense Level: The Guideline for violation of 18 U.S.C. § 371 [1503] is found in § 2J1.2(a) and calls for a base offense level of 12.	12
Specific Offense Characteristic: Pursuant to § 2J1.2(b)(2), 3-levels are added because the offense conduct substantially interfered with the administration of justice.	+3
Specific Offense Characteristic: Pursuant to § 2J1.7, +3 3-levels are added because Bertoli committed a federal offense while on bail for another federal offense.	
Adjustments for Role in the Offense: Pursuant to § 3B1.1(a), the offense is increased four levels.	+4
Adjusted Offense Level (Subtotal):	22

Group Two - Obstruction of Grand Jury Investigation

Base Offense Level: The Guideline for violation of 18 U.S.C. § 371 [1503] is found in § 2J1.2(a) and calls for a base offense level of 12.	12
Specific Offense Characteristic: Pursuant to § 2J1.2(b)(2), 3-levels are added because the offense conduct substantially interfered with the administration	+3
Adjustments for Role in the Offense: Pursuant to § 3B1.1(a), the offense is increased four levels.	+4

Adjusted Offense Level (Subtotal):	19

Group Three -- Obstruction of SEC Investigation

Base Offense Level: The Guideline for violation of 18 U.S.C. § 371 [1503] is found in U.S.S.G. § 2J1.2(a) and calls for a base offense level of 12.	12
Specific Offense Characteristic: Pursuant to § 2J1.2(b)(2), 3-levels are added because the offense conduct substantially interfered with the administration of justice.	+3
Adjustments for Role in the Offense: Pursuant to § 3B1.1(a), the offense is increased four levels.	+4
Adjusted Offense Level (Subtotal):	19

Multiple-Count Adjustment (*See* Section 3D1.4)

Units	
Adjusted Offense Level for Group One 22	1
Adjusted Offense Level for Group Two 19	1
Adjusted Offense Level for Group Three 19	1
Total Number of Units	+3
Greater Adjusted Offense Level	22
Increase in Offense Level	+3
Combined Adjusted Offense Level:	25

Bertoli's Criminal History
Criminal History Computation

At the time the instant offense was committed, Bertoli was on probation. Pursuant to U.S.S.G. § 4A1.1(d), two points are added. The total of the criminal history points is 3. According to the sentencing table at Chapter 5, Part A, 2 to 3 criminal history points establish a criminal history category of II.

A resentencing hearing took place on 13 March 1995. *See* transcript on Resentencing ("Resentencing tr."). At a hearing for bail pending appeal on 6 March 1995, counsel for Bertoli, responding to an inquiry as to when resentencing could be scheduled responded: "We're ready. Whenever the Court wants to resentence we're prepared." *See* transcript of hearing for bail pending resentencing ("Bail tr.") at 7. At the bail hearing, counsel for Bertoli was asked twice whether he wanted to call any witnesses for resentencing purposes and responded: "We do not want to call anybody." Bail tr. at 6. At the resentencing hearing, counsel for Bertoli did, however, call Special Agent Michael Cahill of the Federal Bureau of Investigation.

At the conclusion of the examination of Special Agent Cahill, counsel to Bertoli was asked whether there were "any other witnesses or anything else [he] want[ed] to offer." Resentencing tr. at 56. The answer was: "No." *Id.* Significantly, Bertoli's co-defendant, Richard Cannistraro, was in court for the entire hearing and was the subject of a discussion concerning findings which were based upon his plea allocution.

Id. at 28-29. Nevertheless, Bertoli did not seek to call Cannistraro as a witness.

After giving both Bertoli and the Government an opportunity to offer additional evidence or call additional witnesses, counsel for Bertoli was given the opportunity to argue or comment on the Addendum to the Presentence Report. Counsel declined the opportunity. *Id.* at 56. Significantly, he did not address the examination of Special Agent Cahill and how such examination affected, if it did, the Addendum to the Presentence Report or the guideline calculation, as set out by Probation. *Id.* at 6. Before explaining the guideline calculation, counsel was again given the opportunity to argue on these issues and declined the opportunity. *Id.* at 57. After the guideline range was explained, counsel for Bertoli was given the opportunity to speak concerning sentencing; he declined to do so. Resentencing tr. at 61. Bertoli was given the opportunity to, and did speak, concerning his resentencing. *Id.* at 61-66. Thereafter, sentence was imposed, as set out above. Bertoli was sentenced for the reasons stated at the first sentencing on 28 March 1994, for the reasons stated in *Bertoli*, 854 F.Supp. at 1125-55; for the reasons stated at the resentencing on 13 March 1995, Resentencing tr. at 57-61, 67-70 and for the reasons which follow.

I. THE APPROPRIATE GUIDELINE RANGE

As indicated, the Third Circuit ruled that the 1989 Sentencing Guidelines Manual should be applied to all of

Bertoli's counts of conviction, even though the conspiracy charged in Count 3 extended into the period covered by the 1991 Guidelines Manual. Applying the 1989 Guidelines Manual to Bertoli's counts of conviction, the Third Circuit then ruled that the cross-reference provision of section 2J1.2(c) of the Guidelines could not be applied in this case because, by his obstructive conduct, Bertoli sought to protect himself, as well as others. According to the Third Circuit, under the 1989 Guidelines Manual, this cross-reference provision can be used only when a defendant's obstructionist conduct was directed at assisting another, rather than himself, to avoid punishment. *Bertoli*, 40 F.3d at 1404-1407.

Significantly, the Circuit did not question the grouping analysis or findings, as set out in *Bertoli*, 854 F.Supp. at 1138-47. Similarly, it did not question the finding, pursuant to section 2J1.7 of the Guidelines, that Bertoli's obstructions of the present prosecution occurred while Bertoli was on pretrial release. It did not question the finding, pursuant to section 3B1.1 of the Guidelines, that Bertoli was an organizer or leader of these obstructionist activities, which involved five or more participants. It did not question the finding that Bertoli's criminal history category is Category II. Significantly, Bertoli did not appeal these rulings to the Circuit.

Pursuant to the decision of the Circuit, Bertoli's offense level must now be calculated by using sections 2J1.2(a) and (b) of the 1989 Manual, rather than by using the cross-reference

provision of section 2J1.2(c).[5] Following the directions of the Circuit, Bertoli's offense level is Level 25 and his criminal history category is Category II. Based on these calculations, Bertoli's Sentencing Guidelines range is 63-78 months.

A. *The Offense Level is 25*

1. The Counts of Conviction Are Properly Separated into Three Groups

At Bertoli's sentencing, the Government argued that Bertoli's convictions of conspiracy to obstruct justice, Count 3, and obstruction of justice, Count 6, should be separated into three different groups pursuant to sections 1B1.2(d), 3D1.1, and 3D1.2 of the Guidelines. Specifically, the Government argued that, under section 1B1.2(d) and Application Note 5 to that section, Bertoli's conviction on Count 3 should be treated as convictions on five separate conspiracies to obstruct justice. *See United States v. Beard*, 960 F.2d 965 (11th Cir. 1992).

The obstructions of justice invaded three distinct societal interests -- the societal interest in the proper conduct of (1) the federal district courts (the Securities and Exchange Commission ("SEC") lawsuit, Cannistraro's 1987 prosecution, and the instant prosecution), (2) federal grand juries (the grand jury investigation in the instant prosecution), and (3) federal administrative agencies (the SEC investigation). The Government argued that Group 1

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[5] Unless otherwise indicated, all further references to the Sentencing Guidelines are references to the 1989 Guidelines Manual.

should consist of the three conspiracies to obstruct federal court proceedings, as well as Count 6; Group 2 should consist of the conspiracy to obstruct the grand jury investigation in this case; and Group 3 should consist of the conspiracy to obstruct the SEC investigation.

This argument was accepted. *Bertoli*, 854 F.Supp. at 1138-44. On appeal, it appears the Circuit did not deem this grouping analysis to be incorrect. Indeed, it further appears the Circuit tacitly approved the analysis and conclusions in that it discussed the grouping analysis without questioning or criticizing it. *Bertoli*, 40 F.3d at 1401-04. Bertoli did not appeal this ruling to the Circuit on appeal.

As explained, and for the reasons stated in the previous opinion, *see Bertoli*, 854 F.Supp. at 1138-53, Bertoli's counts of conviction will be grouped in the same manner as when Bertoli was first sentenced on 28 March 1994. After grouping, the offense level must be determined by reference to sections 3D1.3(a) and 3D1.4 of the Guidelines. *See Bertoli*, 854 F.Supp. at 1144-52.

2. *The Offense Level for Group 1 is Level 22*

a. Under U.S.S.G. § 2J1.2(a) and (b), Bertoli's *Offense Level is Level 15*

The guideline for obstruction of justice convictions is section 2J1.2 of the Guidelines. Because the Circuit has ruled that the cross-reference provision of section 2J1.2(c) is not

applicable to this case, the pertinent portion of this Guidelines section provides as follows:

> *Obstruction of Justice*
>
> (a) Base Offense Level: 12
>
> (b) Specific Offense Characteristics
>
> (1) If the offense involved causing or threatening to cause physical injury to a person, or property damage, in order to obstruct the administration of justice, increase by 8 levels.
>
> (2) If the offense resulted in substantial interference with the administration of justice, increase by 3 levels.

Under Section 2J1.2(a), the base offense level is 12. Pursuant to Section 2J1.2(b)(2), the offense level is increased by three levels because, "the offense resulted in substantial interference with the administration of justice." This results in an offense level of 15.

At Bertoli's sentencing, it was recognized that Bertoli's obstructions qualified for a three level increase, pursuant to section 2J1.2(b)(2) of the Guidelines. *See Bertoli*, 854 F.Supp. at 1144.

The Guidelines do not provide a precise definition of the term "substantial interference with the administration of justice." Rather, the Guidelines provide only a non-exclusive list of

examples of the proper application of section 2J1.2(b)(2). According to the Application Notes, "'[s]ubstantial interference with the administration of justice' includes a premature or improper termination of a felony investigation, an indictment or verdict based upon perjury, false testimony, or other false evidence, or the unnecessary expenditure of substantial governmental or court resources." Application Note 1 to § 2J1.2. The evidence established, by a preponderance of the evidence that Bertoli substantially interfered with the administration of justice, as explained below.

The term "substantial interference with the administration of justice" is broad and flexible. The three level increase for such substantial interference in obstruction and perjury cases should be applied liberally.[6] In *United States v. Butt*, 955 F.2d 77 (1st Cir. 1992), a police officer, James Semon, was convicted of, among other things, lying to a grand jury about his knowledge of, and participation in, a payoff scheme with a prostitute. On appeal, the First Circuit upheld a three level increase for substantial interference with the administration of justice based only on the representation by the Government that the defendant's perjury "needlessly complicated its investigation and prosecution." Id. at 88. According to the First Circuit:

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[6] It appears Section 2J1.2(b)(2) is identical to Section 2J1.3(b)(3), which is contained in the perjury guideline.

> The government represented to the district court that Semon's denials before the Grand Jury in April 1989 needlessly complicated its investigation and prosecution. Had Semon admitted his involvement at the outset, the government arguably would not have needed to locate all three of the prostitutes who testified about receiving police protection from Butt and Semon in exchange for weekly payments, or the several witnesses who corroborated this testimony. With fewer witnesses to examine, the government, presumably, would have been spared time and expense at trial. Perhaps most important, had Semon testified truthfully, the government might not have immunized persons whom it otherwise could have prosecuted.

Id.

In *United States v. Barnhart*, 889 F.2d 1374 (5th Cir. 1989), *cert. denied*, 494 U.S. 1008 (1990), the defendant was convicted of perjury that essentially amounted to testifying in the grand jury that he did not recall previously telling Government agents about certain details of various transactions. At sentencing, the district court increased the offense level pursuant to section 2J1.3(b)(2). The increase was based upon only the Probation Department's conclusory statement that the investigation was hindered "because the defendant was uncooperative and provided less than truthful information to the

grand jury," *Id.* at 1380, and the conclusory finding of "substantial interference from the 'evidence at trial.'" *Id.* The Fifth Circuit affirmed the three level increase in the offense level. *Id.*[7]

The issue as to whether section 2J1.2(b)(2) applies in this case is not close in view of the liberal application of this Guidelines provision to obstructive and perjurious conduct far less serious than the conduct in which Bertoli engaged. It is clear that, concerning the Group 1 conspiracies to obstruct federal court proceedings, these conspiracies resulted in substantial interference with the administration of justice. For example, Bertoli's movement of the Cayman Islands' money from the Cayman Islands to Andorra after the commencement of this prosecution, *see Bertoli*, 854 F.Supp. at 1135-36, Government's Sentencing Memorandum at 54-60, resulted in the Government being unable to obtain more than $7 million to which it is legally entitled as a result of its prosecutions of Eisenberg and

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[7] *See also United States v. DeSalvo*, 26 F.3d 1216, 1219, 1223-34 (2d Cir.) (three level increase for substantial interference upheld based on the apparently conclusory finding that the defendant's "perjury and obstruction caused a substantial expenditure of government resources that would not have been needed had [the defendant] testified truthfully from the start"), *cert. denied*, 115 S.Ct. 192 (1994); *United States v. Lueddeke*, 908 F.2d 230, 232, 234 (7th Cir. 1990) (three level increase for substantial interference upheld because Government agents spent two weeks trying to "sort out the truth" after the defendant's perjury, even though the Government, within a week of the defendant's perjury, discovered evidence showing that the defendant's grand jury testimony was false).

Cannistraro. *Bertoli*, 854 F.Supp. at 1153-55. These conspiracies also necessitated a civil action, *United States v. Cannistraro and Meyer*, Civil No. 93-5238, filed 23 November 1993 (D.N.J.), to obtain approximately $789,000 that had originally been in Cannistraro's Centurion account, but had been transferred by Bertoli to the Fosca account in Andorra and then transferred to Mr. Meyer. The expenditure of these Governmental resources would have been unnecessary had Bertoli not obstructed justice by moving the money from the Cayman Islands to Andorra.

Bertoli's inducement of Ernest Foster to evade possible service of process, *see Bertoli*, 854 F.Supp. at 1136, Government's Sentencing Memorandum at 61-63, caused the Government to forego Foster's testimony at the Cayman Islands depositions in September 1991. *See* Government's Sentencing Memorandum at 62 n.23. This prevented the grand jury from learning of Bertoli's witness tampering and, the Government contends, from returning an indictment charging him with violating 18 U.S.C. § 1512. The Government also contends that had Foster not followed Bertoli's orders but instead remained in the Cayman Islands to testify truthfully at the depositions, the Government would have learned of Bertoli's witness tampering at that time and would have been able to present that evidence to the grand jury prior to the return of the Second Superseding Indictment. It appears the Government did not learn of this conduct by Bertoli until well after that time. Indeed, it also

appears Foster did not agree to testify until the middle of Bertoli's trial; and when he did testify, Foster was credible.[8]

The filing of the false and fraudulent Isaacson affidavits as a basis for a motion to dismiss in this case, *see Bertoli*, 854 F.Supp. at 1136-37, Government's Sentencing Memorandum at 53-54, caused the Government, and the court, to waste resources in responding to, and deciding, the motion. The introduction of these false affidavits also made the Government's burden at trial more difficult. Rather than simply proving that Bertoli had interests in various Cayman Islands' accounts, the Isaacson affidavits forced the Government to attempt to disprove the notion that Isaacson and Herb Cannon owned these accounts. This conduct necessitated the expenditure of efforts that would have been unnecessary absent Bertoli's obstructive conduct.

Cannistraro's perjury and false filings in connection with his 1987 sentencing, *see Bertoli*, 854 F.Supp. at 1133-34, Government's Sentencing Memorandum at 44-45, resulted in a sentence on Cannistraro based on false and perjurious information. Had the fact of Cannistraro's millions of dollars in the Cayman Islands been known, the amount of restitution ordered would have been far greater. Cannistraro's perjury also hindered the continuing grand jury investigation; it kept the Government from knowing the existence and precise location of the Cayman Islands' accounts of Bertoli, Eisenberg, and

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[8] This determination is made as a result of the opportunity to observe Foster's demeanor on direct and cross, the way he responded to the questions and the content of his testimony.

Cannistraro. As the Government argued, this resulted in the Government expending years of effort to identify and obtain evidence about these accounts.

Bertoli's offense level is properly increased, pursuant to section 2J1.2(b)(2), on the basis of any one of these acts taken in furtherance of the Group 1 conspiracies to obstruct federal court proceedings. Each of these acts resulted in the substantial interference with the administration of justice.[9] Consequently, the offense level for Group 1 is increased by three levels.

The same increase results with respect to the Group 2 and Group 3 conspiracies. The Group 3 conspiracy to obstruct the SEC investigation substantially interfered with not only the SEC investigation, but also the criminal investigation in this district. For example, Cooper's perjury, *see Bertoli*, 854 F.Supp. at 1131-32, Government's Sentencing Memorandum at 36-39, and Eisenberg's perjury, *see Bertoli*, 854 F.Supp. at 1132, Government's Sentencing Memorandum at 40, were critical components of Bertoli's eight year conspiracy to cover up and conceal his illegal fraudulent trading schemes. Cooper and Eisenberg were central figures in these fraudulent trading schemes. They knew the players; they knew the plan; and they knew how the plan was executed. Cooper and Eisenberg had direct, firsthand knowledge that Bertoli had masterminded and orchestrated several fraudulent securities trading schemes that

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[9] The Cahill Resentencing Affidavit could be disregarded in its entirety without any impact on the basis for these findings.

allowed him to line his pockets and the pockets of others with millions of dollars in illegal profits.

When Cooper spoke to the SEC at the beginning of its investigation in 1983 he lied. He lied again at his SEC deposition, as did Eisenberg. Consequently, the SEC had to attempt to build a circumstantial case. It spent more than two years taking numerous investigative depositions. It subpoenaed numerous documents. It made inquiries of numerous brokerage firms concerning the trading of LCI and Toxic Waste securities. The SEC had to do all of this because no one told the SEC what actually happened.

The criminal investigation concerning Bertoli, and his co-defendants, was also impeded. Because of these obstructions, the Government, like the SEC, was forced to build a case from circumstantial evidence. It appears the Government was forced to interview scores of witnesses who turned out to be unimportant. The Government was forced to review scores of documents that turned out to be irrelevant. The Government was forced to immunize witnesses in an attempt to find out what really happened. Indeed, because of these acts of obstruction, neither the SEC nor the Government ever obtained direct and firsthand evidence of the true nature of Bertoli's fraudulent trading schemes until after the first Indictment in this case.

There is no question that, had figures such as Eisenberg and Cooper told the truth at the outset of this investigation, many unimportant witnesses would not have been interviewed. Many irrelevant documents would not have been reviewed. Many

witnesses would not have been immunized. And most importantly, the Government argues, Bertoli would have in all likelihood been charged with substantive counts of mail fraud, wire fraud, and securities fraud arising from his fraudulent trading schemes -- crimes on which the statute of limitations had run while the Government was attempting to break through the eight year Bertoli conspiracy to cover up and conceal.

The Group 2 conspiracy to obstruct the grand jury investigation had a similar negative effect on the administration of justice. For example, when Bertoli shredded the Euro Bank documents, *see Bertoli*, 854 F.Supp. at 1134, Government's Sentencing Memorandum at 47-52, he destroyed many documents that would have demonstrated his ownership interests in various accounts, as well as many documents concerning the transfer of money in those accounts. As a result, the Government could not directly establish Bertoli's ownership interests in many accounts at Euro Bank and could not trace the flow of all the money precisely. Instead of the simple task of introducing account ownership documents, the Government had to attempt to show Bertoli's ownership interests in various accounts by weaving together a huge amount of circumstantial evidence.

When Bertoli shredded the Paget-Brown records, *see Bertoli*, 854 F.Supp. at 1135, Government's Sentencing Memorandum at 47-52, he destroyed many of the records concerning the first set of companies, and most of the records concerning the second set of companies. This in turn made the Government's task of tracing the flow of the money much more

difficult. Had Bertoli not destroyed the Euro Bank and Paget-Brown records, the Government would have saved time, resources and effort in attempting to recreate a picture of Bertoli's dealings in the Cayman Islands.

The Cayman Islands' "blocks", *see Bertoli*, 854 F.Supp. at 1134, Government's Sentencing Memorandum at 45, also hindered the Government investigation.[10] Had Bertoli not blocked the disclosure of documents sought in the Gentlemen's Agreement Request, the Government would have been able to obtain evidence of the Cayman Islands' accounts of Bertoli, Cannistraro, and Eisenberg back in 1987. Instead, the Government had to prepare letters rogatory during the grand jury investigation in 1988 and had to hire a Caymanian attorney to review these letters rogatory and assist in their processing. Then, when the Caymanian attorney advised the Government that the filing of these letters rogatory would be fruitless, the Government had to reprepare and refile them after the first Indictment in this case. As a result, the Government was unable to obtain critical Cayman Islands' records for many years, and indeed, did not obtain them until almost two years after the return of the first Indictment.

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[10] As the Government stated at the Resentencing Hearing: "The Government has never, during the course of the trial, maintained that [the] blocks in 1986 and 1987 were illegal in themselves. ... These were overt acts in furtherance of the conspiracy. They were part of the conspiracy. Resentencing tr. at 40. An act in furtherance of an illegal conspiracy does not itself have to be illegal.

Finally, the bakery obstructions, *see Bertoli*, 854 F.Supp. at 1132-33, Government's Sentencing Memorandum at 42-44, caused the Government to expend a great deal of unnecessary effort. The bakery obstructions began as essentially a "shell game" designed to confuse any Government authorities who were investigating activities at Monarch. In 1983 and 1984, Monarch received subpoenas from the Federal grand jury in Chicago and the Chicago Strike Force of the U.S. Department of Justice, requesting a limited number of Monarch records unrelated to this case. In 1985, the Chicago Strike Force complained that Monarch had not sent all the records responsive to the subpoenas. Eisenberg told Bertoli about this; Bertoli told Eisenberg to pack *all* of Monarch's records and send them to Chicago. Bertoli said that this would confuse the authorities and that, moreover, if another agency or grand jury requested Monarch's records, Eisenberg could simply say that they were all in Chicago. Eisenberg followed Bertoli's advice. He sent twenty boxes of Monarch's records to Chicago.

When the grand jury in New Jersey, through the Office of the U.S. Attorney, subpoenaed Monarch for records concerning LCI and Toxic Waste trading, it was told that all the Monarch records were in Chicago. When the Office of the U.S. Attorney contacted the Chicago Strike Force, it was told by the Chicago Strike Force that the records could not be sent to New Jersey because the Chicago Strike Force had not yet fully reviewed the twenty boxes of documents that Monarch had sent to Chicago in order to determine precisely what was relevant to the

Chicago investigation. Consequently, the Office of the U.S. Attorney in New Jersey spent approximately $18,000 to copy all the records, and representatives of two Government offices then spent a considerable amount of time sorting through twenty boxes of Monarch records to determine which of those records were relevant to their respective investigations.

Another consequence of the bakery obstructions was that, as a result of hiding some of the Monarch records, the Government was forced over the years to make several efforts (through subpoena, correspondence, and Court order) to obtain a full set of Monarch records. All this would have been unnecessary had Bertoli and Eisenberg not played a "shell game" designed to confuse and obstruct.

The bakery obstructions also provided Cannistraro and Bertoli with the opportunity to construct smokescreen arguments concerning the Monarch records, which caused the Government to expend a great deal of effort to rebut those arguments. For example, during Cannistraro's 1987 prosecution, Cannistraro notified the Office of the U.S. Attorney that he would object at trial to the introduction into evidence of numerous Monarch records on chain of custody and authenticity grounds. As a consequence, the Office of the U.S. Attorney was forced to do a significant amount of research and investigation to support the admissibility of these records.

In this case, Bertoli used the state of Monarch's records, a state for which he bears partial responsibility, to make numerous similar objections to the introduction of Monarch

records at trial. This in turn caused the Government once again to do considerable research, to spend a considerable of time trying to find appropriate records custodians for these Monarch records and to spend a considerable amount of time gathering and preparing records from other entities. This was done to corroborate the authenticity, accuracy, and reliability of Monarch's records. All of this activity culminated in the efforts expended at the Rule 104 Hearing in May 1993, which took almost two weeks to complete. The 104 Hearing and efforts would have been unnecessary had Bertoli not made specious authenticity and chain of custody arguments that were essentially based on his own obstructions of justice.

The Group 1, Group 2 and Group 3 conspiracies each resulted in the substantial interference with the administration of justice, for which an increase in the guideline calculations is appropriate.

b. Bertoli's Obstructions of the Instant Prosecution Occurred While Bertoli Was On Pretrial Release.

Bertoli engaged in the obstruction of justice charged in Count 6, as well as that portion of Count 3 that charged the conspiracy to obstruct the instant prosecution, while on pretrial release in this case. Because Bertoli committed both crimes while he was on pretrial release, the Government argued at sentencing that he was subject to an additional ten year term of imprisonment on each count pursuant to 18 U.S.C. § 3147. *See United States v. DiPasquale*, 864 F.2d 271, 279-81 (3d Cir. 1988). Moreover,

the Government argued that, pursuant to Section 2J1.7 of the Guidelines, along with the background commentary to that section, Bertoli's offense level had to be increased by three levels because he committed these crimes while on pretrial release and because he was given sufficient notice by the Government of the applicability of 18 U.S.C. § 3147. *See* Government's Sentencing Memorandum at 102-104; Government's Reply Sentencing Memorandum at 13-14.

This argument was accepted in imposing sentence on Bertoli. Bertoli's offense level was increased by three levels. *Bertoli*, 854 F.Supp at 1149-50. The Circuit did not question this ruling in any way. Indeed, Bertoli did not appeal this ruling to the Circuit.

Consequently, for the reasons stated in *Bertoli*, *id.*, the Government's Sentencing Memorandum, and the Government's Reply Sentencing Memorandum, Bertoli's offense level is appropriately increased by three levels pursuant to section 2J1.7 of the Guidelines.

c. *Bertoli Was An Organizer or Leader of These Obstructionist Activities, Which Involved Five or More Participants*

Section 3B1.1(a) of the Guidelines mandates a four level increase to a defendant's offense level "[i]f the defendant was an organizer or a leader of a criminal activity that involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(a). At Bertoli's sentencing, the Government argued that

this provision was applicable in this case. *See* Government's Sentencing Memorandum at 105-108; Government's Reply Sentencing Memorandum at 15. This argument was accepted. *Bertoli*, 854 F.Supp. at 1150-51. The Third Circuit did not question the finding that Bertoli was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive. Indeed, Bertoli did not appeal this ruling to the Circuit.

Thus, for the reasons stated in *Bertoli*, 854 F.Supp. at 1150-51, the Government's Sentencing Memorandum, and the Government's Reply Sentencing Memorandum, Bertoli's offense level is properly increased by four levels pursuant to section 3B1.1(a) of the Guidelines.

d. Summary of Calculations of Group 1 Offense Level.

i. *Base Offense Level*

Applicable Guideline: § 2J1.2

- Base Level § 2J1.2(a).....	12
- Upward adjustment pursuant to § 2J1.2(b)(2).....	3
- Base Offense Level.....	15
ii. Upward adjustment pursuant to § 2J1.7...	3
iii. Upward adjustment pursuant to § 3B1.1(a).....	4
iv. Group 1 offense level.....	22

3. Under the Grouping Rules of U.S.S.G. § 3D1.4, the Offense Level for Group 1 is Increased By Three Levels.

The second step in the grouping analysis is to determine the offense level for the conspiracy to obstruct the grand jury investigation in Group 2 and the offense level for the conspiracy to obstruct the SEC investigation in Group 3. Thereafter, the combined offense levels for Group 1, Group 2, and Group 3 must be determined by applying the rules set forth in section 3D1.4 of the Guidelines. In the instant case, these rules require that the level 22 offense level for Group 1 be increased by three levels, resulting in a combined offense level of 25.

a. The Group 2 Offense Level is Level 19

Group 2 consists of the conspiracy to obstruct the grand jury investigation. Pursuant to section 2J1.2(a), the base offense level for this conspiracy is 12. As previously indicated, this base offense level is increased by three levels, pursuant to section 2J1.2(b)(2), because this conspiracy "resulted in substantial interference with the administration of justice." This results in an offense level of 15.[11]

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[11] The Government argues that based on *United States v. Berkowitz*, 927 F.2d 1376, 1390 (7th Cir.) *cert. denied*, 112 S.Ct. 141 (1991), the offense level for the Group 2 conspiracy should be increased by 8 levels because Bertoli destroyed documents to prevent them from being used against him, and hence, the scheme "involved ... property damage." U.S.S.G. § 2J1.2(b)(1). Because it was previously determined that the offense level under U.S.S.G. § 2J1.2(a) and (b) would be 15, *see*

As established at trial, Bertoli organized the scheme to obstruct justice and led it from its inception, including through the grand jury investigation. Because that obstruction scheme, as it related to the grand jury investigation, also involved five or more participants, an upward adjustment of four (4) points was and is warranted pursuant to section § 3B1.1(a) of the Guidelines. *Bertoli*, 854 F.Supp. at 1151. Because the conspiracy to obstruct the grand jury investigation did not occur while Bertoli was on pretrial release, however, the three level adjustment pursuant to section 2J1.7 is not applicable to this conspiracy. The Group 2 offense level is level 19.

b. The Group 3 Offense Level is 19

Group 3 consists of the conspiracy to obstruct the SEC investigation. Under section 2J1.2(a), the base offense level for this conspiracy is 12. As explained, the base offense level is increased by three levels, pursuant to section 2J1.2(b)(2), because this conspiracy "resulted in substantial interference with the administration of justice." This results in an offense level of 15.

Bertoli, 854 F.Supp. at 1144, "the Government believes it inappropriate to press such an argument on this resentencing. The Government believes it inappropriate to disturb any previous findings (such as the findings concerning grouping, § 2J1.7, and § 3B1.1) by this Court that were not questioned on appeal. If, however, Bertoli successfully attempts to revisit those issues, the Government believes it entitled to make arguments such as the one noted above." Government's Resentencing Memorandum at 24 n.7.

As established at trial, Bertoli organized and led the scheme to obstruct the SEC investigation. Because that obstruction scheme also involved five or more participants, an upward adjustment of four (4) points was and is warranted pursuant to section § 3Bl.l(a) of the Guidelines. *Bertoli*, 854 F.Supp. at 1151-52. Because this conspiracy to obstruct the SEC investigation did not occur while Bertoli was on pretrial release, the three level adjustment pursuant to section 2J1.7 is not applicable to this conspiracy. The Group 3 offense level is level 19.

c. The Combined Offense Level

The combined offense level is determined by the number of units within the meaning of section 3D1.4. Pursuant to this section, the group with the highest offense level is counted as one unit; in this case, that is Group 1. The court must then "[c]ount one additional unit for each Group that is equally serious or from four levels less serious." U.S.S.G. § 3D1.4. In this case, the offense level for Group 1 is level 22; the offense level for Group 2 is level 19; and the offense level for Group 3 is 19. Because the offense levels for Group 2 and Group 3 are each 3 levels less serious than the offense level for Group 1, each of Group 2 and Group 3 is counted as one additional unit. Therefore, there is a combined total of three units.

The next step in determining the combined offense level is to "[take] the offense level applicable to the group with the highest offense level and [increase] that offense level by the amount indicated [in the table contained in section 3D1.4]."

U.S.S.G. § 3D1.4. The table in section 3D1.4 keys the offense level increase to the number of units present. In this case, because there are three units, the table specifies that three levels should be added to the offense level of the group with the highest offense level, Group 1.

The group with the highest offense level is Group 1 -- with an offense level of 22. Pursuant to section 3D1.4 of the Guidelines, three levels are added to this Group 1 offense level. The combined offense level for Bertoli's counts of conviction is level 25.

B. Bertoli's Criminal History Category Should Be Category II

Probation determined that Bertoli's criminal history merited three points under the Guidelines. Specifically, Probation concluded that Bertoli should receive one point as a result of his 1978 conviction, *see* U.S.S.G. § 4A1.1(c), and two (2) points because Bertoli committed the instant offense while on probation for that 1978 conviction. *See* U.S.S.G. § 4A1.1(d). These three criminal history points resulted in Bertoli's criminal history category being Category II. *See* Government's Sentencing Memorandum at 116-19; Government's Reply Sentencing Memorandum at 12.

At sentencing, this argument was accepted. *Bertoli*, 854 F.Supp. at 1152-53. The Third Circuit did not question this determination. Indeed, Bertoli did not appeal this ruling to the Circuit. For the reasons stated in *Bertoli*, 854 F.Supp. at 1152-

53, the Government's Sentencing Memorandum, and the Government's Reply Sentencing Memorandum, Bertoli's criminal history category is Category II.

Accordingly, Bertoli's offense level is 25 and his criminal history category is Category II, which results in a sentencing guidelines range of 63 to 78 months.

II. THE APPROPRIATE DOLLAR FINE ON BERTOLI

A. Under the 1989 Sentencing Guidelines Manual, a $7 Million Fine Represents a Fine Within the Guidelines Range, Not an Upward Departure.

This court relied on the 1993 Guidelines Manual in imposing sentence on Bertoli. Under the 1993 Manual, the maximum fine within the Guideline range was $125,000. The imposition of a $7 million fine, therefore, constituted an upward departure from the Guidelines. *See Bertoli*, 854 F.Supp. at 1153-55.

The Circuit ruled that, because of the magnitude of the departure, all factual findings made to justify the departure needed to be supported by clear and convincing evidence. *Bertoli*, 40 F.3d at 1407-11. The Circuit then concluded the findings was not supported by clear and convincing evidence. *Id.* at 47-48. It ordered a recalculation of the fine.[12]

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[12] In reaching this conclusion, the Third Circuit apparently assumed that the Court's finding was based solely on Ernest Foster's trial

The Circuit's ruling that the 1989 Guidelines Manual applies to this resentencing has rendered the previous fine analyses irrelevant. The 1989 Guidelines Manual sets out rules for imposing fines that are different from those used by this court and the Third Circuit in analyzing the fine issue on Bertoli's first sentencing. Under the 1989 Guidelines Manual, the maximum fine is the greater of (1) the amount specified in the fine table, (2) "twice the gross pecuniary loss caused by the offense," or (3) "three times the gross pecuniary gain to all participants in the offense." U.S.S.G. § 5E1.2(c)(2). It is not an upward departure under the 1989 Guidelines Manual to impose a fine less than "twice the gross pecuniary loss caused by the offense," or "three times the gross pecuniary gain to all participants in the offense." Such a fine constitutes a fine within the Guidelines range. Because such a fine does not represent an upward departure, the findings made to support the fine have to be supported only by a preponderance of the evidence. *See Bertoli*, slip op. at 45.

Accordingly, pursuant to the 1989 Guidelines Manual, a reimposition of a $7 million fine would constitute a fine well within the Guidelines range, not at upward departure. Nevertheless, because of the comments of the Circuit concerning the imposition of a $7 million dollar fine, *Bertoli*. 40 F.3d at 1407-11, a fine of $100,000.00 ($50,000.00 on each of Counts 3 and 6) was imposed. The reasoning to justify the imposition of a

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testimony; 40 F.3d at 1410; this assumption is not correct. *See Bertoli*, 854 F.Supp. at 1153-55.

$7 million fine under the 1989 Manual is set out should the Government choose to cross-appeal.[13]

B. The Evidence in the Record Supports a Finding that $7 Million is Well Below the Guidelines Maximum Fine

The evidence in the record demonstrates and proves beyond a preponderance of the evidence that the Government has lost, or alternatively that Bertoli has gained, at least millions of dollars as a result of moving the money in the Cayman Islands' accounts from the Cayman Islands to Andorra after the commencement of this case. *Bertoli*, 854 F.Supp. at 1126.

On 6 November 1989, soon after the indictment in this case was unsealed and on the day the defendants were arraigned and bail was set, the United States requested the issuance a letter rogatory to the Grand Court of the Cayman Islands. Documents and evidence concerning the accounts of Bertoli, Cannistraro, and Eisenberg at Euro Bank, Butterfield Bank, and elsewhere were sought from the Cayman Islands for use at the trial of this case. Moreover, the proposed letter rogatory requested that both Sydney Coleman of Paget-Brown and Ernest Foster be deposed.[14]

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[13] Bertoli filed a notice of appeal on 13 March 1995, the day he was sentenced.

[14] In March 1990, the Mutual Legal Assistance in Criminal Matters Treaty (the "MLA Treaty") between the Cayman Islands and the United States became effective. In April, 1990, the United States withdrew its request for a letter rogatory and issued a Treaty Request directly to the

Commencing in November 1989, after the Government filed its request for a letter rogatory, Bertoli took actions to move the money and the documents concerning the third set of companies (Beecham, Centurion, and Eastern) from Paget-Brown to Ernest Foster and then out of the Cayman Islands.

In approximately November 1989, Foster flew to New York at Bertoli's request and met Bertoli at the Marriott Marquis Hotel in New York City. Bertoli told Foster that administration of the third set of companies would be transferred to him from Paget-Brown. When Foster received the documents, Bertoli wanted him to take a trip to Panama and give the documents to the management company that had formed these Panamanian companies. Bertoli also told Foster that there was a substantial amount of money in these three companies and that he wanted to move the money to a safe place outside of the Cayman Islands -- a place in which the United States could not gain access to the money. Bertoli also told Foster that he was to take instructions from Bertoli's long-time associate, Joseph Lugo, because Bertoli thought his phones might be tapped. *See Bertoli*, 854 F.Supp. at 1135; Government's Sentencing Memorandum at 56; Foster's Testimony.

Soon after the meeting at the Marriott Marquis, Foster received a telephone call from Bertoli. Bertoli told Foster that he

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Cayman Islands pursuant to the MLA Treaty. The evidence sought in the Treaty Request paralleled the evidence sought in the proposed letter rogatory. *See Bertoli*, 854 F.Supp. at 1135; Government's Sentencing Memorandum at 55.

wanted Foster to go to Andorra to set up a bank account to which the money from the third set of companies could be moved. In December 1989, Foster, Lugo, and Lugo's associate, Jose Camprubi, went to Andorra. They opened an account named Fosca, S.A. (an abbreviation of Foster-Camprubi) at the Banc Agricoli in Andorra. Foster discussed Andorra's confidentiality laws with the Andorran bankers, confirmed that Andorra had no treaties similar to the MLA Treaty and later discussed the substance of these discussions with Bertoli. *See Bertoli*, 854 F.Supp. at 1135; Government's Sentencing Memorandum at 56-57; Foster's Testimony.

Bertoli called Eisenberg in Florida and arranged to meet with him at a New York City restaurant. Bertoli told Eisenberg that, because the United States was going to the Cayman Islands to look for their money and records of their accounts. Bertoli wanted to move the money and documents concerning the third set of companies from Coleman to Foster, a person whom Bertoli trusted. Bertoli also said that, once they moved the documents from Coleman to Foster, that would be the end of the documents. Eisenberg followed Bertoli's advice; he agreed the administration of his company, Eastern, should be transferred to Foster. *See Bertoli*, 854 F.Supp. at 1135; Government's Sentencing Memorandum at 57; Eisenberg's Testimony.

At about this time, Bertoli and Cannistraro also conversation about the money in the Cayman Islands.[15] During this conversation, Bertoli told Cannistraro that Bertoli wanted to

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[15] Cannistraro testified to this during his plea allocution in this case.

move the money owned by Bertoli, Cannistraro, and Eisenberg from Paget-Brown's control, in an effort to prevent the United States from finding the money. Cannistraro told Bertoli that Bertoli could move Cannistraro's money (which was in Centurion's bank account); thereafter, Bertoli told Cannistraro that the money had been moved to Andorra. *See* Government's Sentencing Memorandum at 57; Cannistraro's Plea Allocution, which is cited at *Bertoli*, 854 F.Supp. at 1126 n.233.

The administration of the three companies was transferred from Coleman to Foster in early 1990. The original documents concerning the three companies were sent to Foster. Foster also gained control of the money in the bank accounts of the three companies. When Foster obtained control of the money, totalling almost $8.7 million, he caused the money to be wire transferred to the Fosca account in Andorra, as directed by Bertoli. Upon completion of the transactions, he advised Bertoli. *See Bertoli*, 854 F.Supp. at 1136; Government's Sentencing Memorandum at 57-58; Foster's Testimony; Coleman's Testimony; Exhibits from Paget-Brown & Co. and Morgan-Grenfell, (Cayman) Ltd.

The money moved from the Cayman Islands to Andorra, approximately $8.7 million, included $5,086,593.94 from Cannistraro's company, Centurion, which was transferred to Andorra in February 1990, $3,132,956.09 from Eisenberg's company, Eastern, and $471,580.61 from Bertoli's company, Beecham. The money from Eastern and Beecham was transferred to Andorra in or about April 1990. Accordingly, of the $8.7

million transferred to Andorra, $8,219,549 was owned by Eisenberg and Cannistraro, and Bertoli's share was less than $500,000. *See Bertoli*, 854 F.Supp. at 1155; Government's Sentencing Memorandum at 129-30; Foster's Testimony, Exhibits from Paget-Brown & Co. and Morgan Grenfell (Cayman) Ltd.

Bertoli controlled *all* of the money after it was deposited into the Fosca account in Andorra, as indicated in paragraphs 20-23 of the Affidavit of Michael J. Cahill, dated 24 February 1992.[16] This finding is also supported by the facts established at trial. *See e.g.*, Foster testimony. Bertoli's former associate, Joseph Lugo, advised the Government that, throughout 1990, Bertoli authorized various disbursements of money from the Fosca account and controlled the funds in the account. As set forth in to the Cahill Affidavit,

> On several occasions, Lugo spoke to Camprubi concerning the monies in the Fosca account. Camprubi told Lugo that Bertoli has, since the inception of Fosca, controlled all of the proceeds in the Fosca account at Banc Agricoli, and that Bertoli has in fact directed the disposition of these funds.

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[16] This Affidavit was attached as Exhibit D to the 1 September 1993 Motion of the United States (to the Third Circuit) to Modify [Bertoli's] Bail Conditions Pending Sentencing, and a copy was submitted to the court in September 1993 and relied upon by the Government to support this fact at sentencing.

> On one occasion, Bertoli told Lugo that he needed approximately $30,000, and he instructed Lugo to have checks drawn on the Fosca account in four fictitious names with each check under $10,000. Lugo relayed these instructions to Camprubi and recalled that a package came from Andorra which contained four checks which were thereafter given to Bertoli.
>
> Throughout 1990, Bertoli, through Lugo, gave instructions to Camprubi to make various wire transfers from the Fosca account to loan money to individuals and entities located in the United States and Canada and to pay attorneys fees through an account in Switzerland. Lugo stated that the current balance in the Fosca account at Banc Agricoli is approximately $200,000 to $300,000, and that the remainder of the $8.6 million has been transferred out of the account at Bertoli's instructions.

24 February 1992 Cahill Affidavit, ¶¶ 20-23. Additionally, Foster told the Government that Bertoli admitted to Foster that he, Bertoli, had authorized disbursements of about one-half of the money in the Fosca account. *See* Proffer of the United States

contained in the September 1, 1993 Motion to the Third Circuit at 8-9.[17]

Eisenberg pleaded guilty to Count 1 of the Superseding Indictment in January 1992. As part of his plea agreement, Eisenberg forfeited to the United States all of his interest in the $3,132,956.09 that was held in Eastern's name until April 1990. *See Bertoli*, 854 F.Supp. at 1155; Government's Sentencing Memorandum at 130.

In early 1993, Cannistraro pleaded guilty to an Information charging him with conspiracy to obstruct justice in this case. As part of his plea agreement, Cannistraro forfeited to the United States all of his interest in the $5,086,593.94 that was held in Centurion's name until February 1990. *See Bertoli*, 854 F.Supp. at 1155; Government's Sentencing Memorandum at 130.

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[17] In its opinion, the Circuit concluded that there was not clear and convincing evidence on which to base a finding that Bertoli controlled the money once he moved it to Andorra. *See Bertoli*, 40 F.3d at 1410. In so doing, it appears the Circuit relied solely on a review of the transcript of Ernest Foster's trial testimony, which did not include testimony as to what happened to the money because such testimony was irrelevant to the issues at trial. *Id.* (The evidence supporting the proposition that Bertoli controls the millions of dollars consists solely of Foster's trial testimony.)

The Government did not rely solely on this testimony to show that Bertoli controlled the money once he moved it to Andorra. Rather, the Government cited its September 1, 1993 Motion to the Third Circuit (and the materials included therein) in support of this fact at sentencing. *See* Government's Sentencing Memorandum at 130.

The Government has recovered $789,083.89 of Cannistraro's money as a result of a civil suit in *United States v. Cannistraro and Meyer*, Civil No. 93-5238, filed November 24, 1993 (D.N.J.) (Lifland, J); the remainder has not been recovered.

Bertoli does not deny that he has access to millions of dollars in foreign bank accounts. Rather, as indicated at page 1 of Bertoli's December 1 Letter to Probation, Bertoli "take[s] no position" regarding the Government's claim, noted at paragraph 164 of the draft Pre-Sentence Report, that "Bertoli has access to millions of dollars in foreign bank accounts." *See Bertoli*, 854 F.Supp. at 1155; Government's Sentencing Memorandum at 131. As noted by the Circuit, "... Bertoli does challenge the ... conclusions as to his control over the Andorra funds...." *Bertoli*, 40 F.3d at 1408 n.24. Nevertheless, this challenge is only that -- a mere challenge to the Government's contention, which contention the Government has proved by a preponderance of the evidence.

As a result of the prosecutions of Eisenberg and Cannistraro, the Government has been, and is, legally entitled to the $8,219,549 owned by Eisenberg and Cannistraro in the Eastern and Centurion accounts. The Government has recovered only $789,084 of this money. Accordingly, the Government has lost approximately $7,430,465 as a direct result of Bertoli's obstruction of the present prosecution by moving Cannistraro's and Eisenberg's money from the Cayman Islands to Andorra and then causing that money to be disbursed. Bertoli's goal in

orchestrating this obstruction was to prevent the United States from ever gaining access to this money.

Under § 5E1.2(c)(2)(B) of the Guidelines, Bertoli's maximum Guidelines fine is approximately $14.8 million. This figure amounts to "twice the gross pecuniary loss caused by the offense." A $7 million fine is in the middle of the Guidelines range under the 1989 Guidelines Manual.

These facts also established that Bertoli gained money as a result of his crimes. As noted above, Bertoli controlled all of the money once it was moved from the Cayman Islands to Andorra, even though his share was only approximately $470,000. Thereafter, this money was disbursed from the Fosca account to various individual and entities at Bertoli's instructions. Bertoli admitted to Foster that he, Bertoli, had authorized the disbursement of approximately one-half of the money in the Fosca account, which conservatively would amount to about $4 million. As mentioned, Bertoli has taken no position on the Government's contention that he has access to millions of dollars in foreign bank accounts.

Under section 5E1.2(c)(2)(C) of the Guidelines, the maximum fine range can be "three times the gross pecuniary gain to all participants in the offense." Even if it is assumed that Bertoli gained the use and control of only approximately $4 million as a result of his disbursements from the Fosca account, the maximum Guidelines range is approximately $12 million. Thus, a fine of $7 million based on "gross pecuniary gain" is

within the Sentencing Guidelines range for fines under the 1989 Guidelines Manual.

Dated: 22 March 1995